Supervalu, Inc.–Pittsburgh Division, d/b/a Uniontown County Market *and* United Food and Commercial Workers International Union, Local Union 23, AFL–CIO, CLC. Case 6–CA–28632

September 23, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On February 17, 1998, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Supervalu, Inc.–Pittsburgh Division, d/b/a Uniontown County Market, Uniontown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Gerald A. McKinney, Esq., for the General Counsel.
James A. Prozzi, Esq., of Pittsburgh, Pennsylvania, for the Respondent.
James R. Reehl, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On a charge filed on December 4, 1996, by United Food and Commercial Workers International Union, Local Union 23, AFL–CIO, CLC (the Union) against Supervalu, Inc.–Pittsburgh Division d/b/a Uniontown County Market (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 6, issued a complaint dated February 28, 1997, alleging violations by Respondent of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me, in Pittsburgh, Pennsylvania, on May 13, 1997, at which all parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the General Counsel and the Respondent filed briefs which have been duly considered.

On the entire record in this case, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operates retail food markets in Pennsylvania, including one located in Uniontown, Pennsylvania. During the year ending November 30, 1996, a representative period, Respondent, in conducting its business operations, purchased and received, at its Pennsylvania stores, goods valued in excess of $50,000, which were sent directly from points located outside the Commonwealth of Pennsylvania. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

Until approximately May 1995, the Uniontown, store, was owned and operated by Cherry Tree Food Mart, Inc.–d/b/a Uniontown County Market. The facility was organized by the Union when owned by Cherry Tree, and the parties executed a collective-bargaining agreement effective for the period November 14, 1993, to February 15, 1997. Thereafter, Respondent assumed possession of the Cherry Tree assets, in the spring of 1995, in lieu of foreclosure, and continued to operate the business at the same location and in unchanged form, employing as a majority of its work force individuals previously employed by Cherry Tree. Respondent, Supervalu, extended recognition to the Union as collective-bargaining representative of the store employees, and agreed to be bound by the terms of the Union's contract with Cherry Tree, shortly after the takeover.

In October 1996, the Union learned that the store would be closed, and sold to a company, Nikae Foods, owned by one Tom Jamieson. Thereafter, Charging Party requested that it be provided with information, including any sales agreement between Supervalu and a purchaser. While it furnished the Union with certain of the requested materials, Respondent has refused to provide the Union with a copy of the sales agreement.

In the instant case, the General Counsel contends that Respondent violated Section 8(a)(5) of the Act by its continued refusal to supply to the Union a copy of the foregoing document. Respondent argues that its conduct was lawful as Charging Party failed to establish the relevance of the information sought to performance of its duties as collective-bargaining

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that the Respondent violated Sec. 8(a)(5) by refusing to furnish the Union with a copy of the sales agreement. However, in doing so, we rely only on his conclusion that it was necessary to assess the Respondent's liability under the WARN Act. We find that the comment from the Respondent's attorney to the Union that the Respondent's WARN obligation "had passed to the buyer of the sale" implies that there was an agreement between the Respondent and the buyer which the Union could reasonably construe as contained in the sales agreement. We find it unnecessary to pass on the judge's conclusions regarding the Respondent's obligation to provide the sales agreement so that the Union could learn whether the Respondent had met its contractual obligation under the contract's successorship clause.

Member Fox agrees with the judge and would rely on both of his grounds for finding the violation.

representative, and because the information was requested in bad faith.

B. Facts[1]

The operative collective-bargaining agreement contains clauses governing successorship, and payment of pro rata vacation benefits in case of layoff, as follows:

> 1.2 *Successorship*
>
> This Agreement encompasses the owner, operator . . . d/b/a Uniontown County Market. In the event that the store in which this Agreement is effective is sold or transferred, the Employer will, in good faith, attempt to have the purchaser or transferee abide by the item [sic] and conditions of employment contained herein.
>
> . . . .
>
> 14.3 *Pro-Rata Benefits Due to Layoff*
>
> Employees laid off due to a lack of work shall receive a paid vacation based on two (2) per cent of gross earnings from the preceding calendar year for each week of vacation earned; provided, the employee has one (1) or more years of continuous service.

On October 6, 1996, the Union's business representative, Wayne Watson, attended meetings of the unit employees conducted by Respondent's Shane R. Maue, regional supervisor, at which Maue, a statutory supervisor, informed the employees that the store was being sold to Tom Jamieson of Nikae Foods. Further, Maue told the gathered workers that they would be offered employment by the new owner, and that they did not need to apply for positions. Following the meetings, Watson informed George Yurasko, secretary-treasurer and director of collective bargaining for Local 23, of the foregoing matters.

By letter dated October 14, 1996, Respondent officially notified the Union that it was closing Uniontown County Market on October 19, and it invited the Union to make contact for the purpose of engaging in "effects" bargaining. Thereafter, on October 19, Respondent did, in fact, cease operations in Uniontown by closing the Uniontown County Market store. Some 8 days later, on October 27, Jamieson opened his store, at the same location, employing a different, unrepresented, work force, under the name Uniontown Shop 'N Save.

The Union was familiar with Jamieson as, at an organized Shop 'N Save store located in Fairmont, West Virginia, originally owned, entirely, by one Craig Phillips, Jamieson had gained an ownership interest and, eventually, a controlling interest. The Union's most recent contract, covering employees working at that store, was negotiated with Jamieson, although Phillips has continued as a part owner. Interestingly, Yurasko testified in this case that "Shop 'N Save," like "County Market," is a tradename owned by Supervalu, Inc.

On October 31, 1996, the Union filed separate charges against Respondent and Jamieson, in regard to the Uniontown, store, alleging violations of Section 8(a)(3) and (5) of the Act, based, at least in part, on an alter ego theory. The General Counsel, thereafter, refused to issue complaint. One day before filing the Board charges, on October 30, Yurasko sent to Respondent a letter "requesting negotiations over the decision to close the Uniontown County Market and the effects of such closing, if unavoidable, on our bargaining unit." In that letter, the Union sought, in order to "prepare for these negotiations," various items of information, including:

> 18. What has the Company done to comply with Article 1.2 of the current collective-bargaining agreement.
>
> 19. Please provide an updated seniority list as of October 19, 1996. . . .
>
> 20. If there are plans to sell or transfer the business, please provide copies of any agreements relating to the same (e.g. sales agreement, transfer agreement, financial agreement, franchise agreement, lease, etc.).
>
> 21. How were employees notified of the closing and what efforts have been made to comply with *WARN*?

In its written response dated November 20, 1996, the Company advised the Union that, as Respondent was not obligated to provide information to the Union relating to the decision to close, or to bargain about that subject, it would not do so. With respect to information relevant to "effects" bargaining, the Company advised the Union that:

> You are well aware that verbal notice of the sale was given to the Union and the employees two weeks before the sale took effect. You are also well aware that the store's assets were purchased by NIKAE FOODS, INC. In line with Article 1.2 of the labor agreement, an attempt was made by SUPERVALU prior to the sale to have NIKAE FOODS abide by the labor agreement. An updated seniority list as of October 19, 1996, is also enclosed, as you requested.

At that time, and on all future occasions, Respondent refused to furnish the Union with a copy of the sales agreement.

The parties met to bargain over the effects of the decision to sell the store on December 10. In the course of that meeting, Yurasko, on behalf of the Union, again requested production of the sales agreement. Attorney James Prozzi, the Company's chief negotiator, refused to provide it, claiming he had no duty to do so. The parties engaged in discussion concerning Respondent's responsibilities under the Federal WARN Act,[2] in light of its failure to provide the affected employees, who numbered more than 50, with a 60-day notice of closing. Prozzi stated that Respondent's obligations and responsibilities under that statute had passed to the buyer, Jamieson, by terms of the sale. Subsequent to the meeting, by letter dated December 23, the Company provided the Union, as requested, with an updated seniority list including the amounts paid by Supervalu as accrued vacation pay to various employees.

The next "effects" bargaining session occurred on January 7, 1997, at which time Yurasko again asked for the sales agreement. The parties discussed accrued vacation pay issues, and reached certain agreements. However, they were unable to agree as to whether five employees, John Angeline, Jamie Clark, Deborah Holloman, Marvin Jacobs and Laurel Patterson, met the "one-year of continuous service" requirement for eligibility for pro rata vacation benefits. In this connection, the Union contended that "continuous service" ran from the date of hire to the date the store was sold. Thus, Yurasko told Prozzi, for this purpose, too, the Union needed to see the sales agreement so as to learn the date of sale and, thus, determine whether the above-referenced employees were entitled to vacation pay.

[1] The factfindings contained here are based on a composite of the documentary and testimonial evidence introduced at trial. The record is generally free of significant evidentiary conflict.

[2] Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, et seq. (1994).

It was Respondent's position that "continuous service," for all employees, ended on October 19, 1996, the date of closing. Following this meeting, on January 14, 1997, the Company, by letter, reiterated that it was unwilling to pay vacation benefits to the five disputed employees who had not accumulated 1 year of "continuous service" as of the closing date.

At trial, Yurasko testified that the Union needed the sales agreement to verify that the sale to Jamieson was an arm's-length transaction, and that Supervalu did not retain an ownership interest, a matter about which he entertained doubts in view of Jamieson's partial, and not total, ownership of the Fairmont, West Virginia, Shop 'N Save, and because of the remarks made to the Uniontown Supervalu employees, when they were advised of the sale, that they would receive employment offers from the new owner without submitting applications; to determine what if anything was done to honor the collective-bargaining agreement's successor clause; to determine the date of sale for its bearing on the pro rata vacation pay dispute; to determine the responsible employer under the WARN Act. Such information, he claimed, was necessary in order to decide if the filing of grievances, or lawsuits, was warranted. On cross-examination, Yurasko acknowledged that, in past dealings with other employers, concerning other closings, he has made similar requests for information, for similar purposes. Further, in such situations, it is not unusual for the employees of the old employer to be told that they will be offered jobs by the new employer.

C. Conclusions

It is well settled that an employer has a statutory obligation to provide, on request, relevant information needed by a union for the proper performance of its duties as collective-bargaining representative of the employer's employees.[3] Where the union's request is for information pertaining to the workers in the bargaining unit, which goes to the core of the employer-employee relationship, that information is presumptively relevant. However, where a union requests information as to matters occurring outside the unit, it must demonstrate that the information sought is, in fact, relevant and necessary.[4] In either situation, a "liberal discovery-type standard" is used to determine whether the information requested is relevant, or potentially relevant, necessitating its production.

Where, as in this case, the bargaining representative's request is for an agreement of sale of a business, the information sought is not presumptively relevant as it does not relate directly to the terms and conditions of employment of the employees represented by the union. Thus, in such situation, the burden is on the union to establish the relevance of the information, and its "theory of relevance must be reasonably specific; general avowals of relevance such as 'to bargain intelligently' and similar boilerplate are insufficient."[5] Where the union seeks a sales agreement, or other information, due to concern about a possible alter ego relationship between seller and buyer, it "must show that it had a reasonable belief that enough facts existed to give rise to a reasonable belief that the two companies were in legal contemplation a single employer."[6] If no such "objective factual basis" exists, there is no duty to furnish the requested information.[7] A union's "mere suspicion" that an alter ego relationship may exist is insufficient to obligate the employer to accede to the request.[8] On the other hand, the union need not show that the information in its possession, which triggered its request for further information, was accurate, or ultimately reliable, and its request may be based on hearsay.[9]

Here, to the extent that the Union sought production of the sales agreement because of concern about a possible alter ego relationship between Respondent and Jamieson, its request was based on nothing more than naked suspicion.[10] Neither the fact that, at another, unrelated, location, in another State, Jamieson was part owner, and not sole owner, of a store, nor the fact that one of Respondent's representatives told employees at the Uniontown, store, that Jamieson would offer them employment after the takeover, are the stuff of "objective factual basis" justifying even a reasonable suspicion of an alter ego relationship. The Union, in this regard, simply has failed to discharge its burden to show the relevance of the requested information to its legitimate concerns.

I also conclude that the Union has not demonstrated a need for the sales agreement, in order to determine the date of sale, so as to administer the collective-bargaining agreement's provision governing the payment of pro rata vacation benefits in the case of layoff. The Union's underlying contention in this regard, that satisfaction of the eligibility requirement for such benefit of "one or more years of continuous service," is to be measured from date of hire to date of sale, rather than date of hire to date of layoff or closing, is plainly contrary to the unambiguous wording of the provision.

The Union's claims that it needed the sales agreement in order to enforce the contract's successorship clause, and to assess Respondent's liability under the WARN Act, stand on different footing. Thus, in its October 30, 1996 written request for, inter alia, production of the agreement, it asked for information concerning compliance with the requirements of the successorship provision and the WARN statute. In reply, Respondent stated, summarily, that it had made an attempt to have the buyer abide by the collective-bargaining agreement. At a later time, it informed the Union that the seller's responsibilities under WARN had passed to the buyer under terms of the sale. In these circumstances, the Union needed to see the sales agreement to learn whether, and to what extent, Respondent had met its contractual obligations under the successorship clause,[11] and to assess relative liability for apparent violations of a Federal statute, WARN, enforceable by private lawsuit.[12] By its own statements to the Union, Respondent made clear that information relevant to performance of the Union's duties as collective-bargaining representative, in these areas, was contained in the agreement of sale.

I conclude, for the above-stated reasons, that Respondent failed to meet its bargaining obligations, and, thus, violated Section 8(a)(5) of the Act, by refusing to furnish the Union with a copy of its sales agreement with Jamieson. I reject Respondent's contention that because, in other instances of store closings, the Union has sought similar information, the sugges-

[3] *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).
[4] *Ohio Power Co*., 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).
[5] *Super Valu Stores, Inc.,* 279 NLRB 22 (1986).
[6] *Knappton Maritime Corp*., 292 NLRB 236 (1988).
[7] *Bohemia, Inc.,* 272 NLRB 1128 (1984).
[8] *Genovese & Di Donno, Inc*., 322 NLRB No. 101 (1996).
[9] *Shoppers Food Warehouse Corp*., 315 NLRB 258 (1994).
[10] See *Reiss Viking*, 312 NLRB 622 (1993).
[11] *Daniel I. Burk Enterprises, Inc.,* 313 NLRB 1263 (1994).
[12] *Compact Video Services*, 319 NLRB 131 (1995).

tion is warranted that the Union sought the sales agreement, in this case, in bad faith. Likewise, it is of no moment that its unfair labor practice charges against Respondent and Jamieson, alleging, inter alia, an alter ego relationship, were dismissed. Nor is the Union required, in order to establish entitlement to see the disputed document, to have actually filed a contractual grievance or a lawsuit. It is so as to be able to make an informed judgment concerning the taking of such actions that the Union needs to see the sales agreement in the first place.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Supervalu, Inc.-Pittsburgh Division d/b/a Uniontown County Market is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers International Union, Local Union 23, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. All retail store employees employed by Respondent at its Uniontown, Pennsylvania store, excluding owners, confidential employees, managers, a scanning coordinator and a D.S.D. receiver, and all guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material the Union has been, and is now, the exclusive representative of all employees in the aforesaid bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to provide a copy of the sales agreement between it and Tom Jamieson (Nikae Foods) to the Union, on and after November 20, 1996, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Supervalu, Inc.–Pittsburgh Division d/b/a Uniontown County Market, Uniontown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by refusing to furnish the Union with a copy of the sales agreement between it and Tom Jamieson (Nikae Foods).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) On request, bargain collectively with the Union by furnishing it with a copy of the sales agreement, as sought by the Union on and after October 30, 1996.

(b) Within 14 days after service by the Region, post at its facility in Uniontown, Pennsylvania, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that Respondent has gone out of business or closed the facility involved in this proceeding, it shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since October 6, 1996.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with United Food and Commercial Workers International Union, Local Union 23, AFL–CIO, CLC in an appropriate bargaining unit, by refusing to furnish the Union with a copy of the sales agreement between us and Tom Jamieson (Nikae Foods), as requested by the Union on and after October 30, 1996. The unit is:

> All retail store employees employed by us at the Uniontown, Pennsylvania, store, excluding owners, confidential employees, managers, a scanning coordinator and a D.S.D. receiver, and all guards and supervisors as defined in the Act.

[13] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto should be deemed waived for all purposes.

[14] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted pursuant to a judgment of the United States court of appeals enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the Union with the above-referenced information, as sought by it on and after October 30, 1996.

SUPERVALU, INC.–PITTSBURGH DIVISION D/B/A UNIONTOWN COUNTY MARKET